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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1979

NO. 79-5601

CARLOS RIVERA GOMEZ

Petitioner

V.

ASTOL CALERO TOLEDO

Respondent.

PETITION OF CARLOS RIVERA GOMEZ FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND APPENDIX

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I N T H E

S U P R E M E C O U R T

O F T H E

U N I T E D S T A T E S

OCTOBER TERM, 1979

NO.

CARLOS RIVERA GOMEZ

Petitioner

V.

ASTOL CALERO TOLEDO

Respondent.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Carlos Rivera Gomez, appellant in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on August 7, 1979. That decision affirmed the judgment of the United States District Court for the District of Puerto Rico entered in the above case on October 23, 1978.

OPINIONS BELOW

The unreported opinion and judgment of the United States District Court for the District of Puerto Rico, dated October 23, 1978, dismissing petitioner's complaint against the respondent Astol Calero Toledo, are set forth at page A-1 of the Appendix. The opinion of the United States Court of Appeals for the First Circuit affirming the dismissal is reported at 602 F.2d 1018 and is set forth at page A-4 of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on August 7, 1979, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254 (1).

QUESTION PRESENTED FOR REVIEW

Whether the plaintiff in a civil rights action filed under 42 U.S.C. §1983 must allege bad faith on the part of the defendant in order to state a cause of action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42, §1983 of the United States Code provides:

> "Every person who, under color of any statute ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The petitioner commenced this civil rights action in the District Court for the District of Puerto Rico in July of 1977. Petitioner claimed damages from respondent Astol Calero Toledo, the Superintendent of Police of the Commonwealth of Puerto Rico, and from the Commonwealth of Puerto Rico and the Police of the Commonwealth of Puerto Rico.[1] The case against the respondent was based on 42 U.S.C. §1983, with jurisdiction invoked under 28 U.S.C. §1331.

The claim against the respondent was for violation of the petitioner's substantive and procedural rights to due process of law in connection with his discharge from employment as a police officer. The allegations in his complaint, which is attached hereto at page A-8 of the Appendix, set forth the following facts.

The petitioner had been employed since 1968 as a police officer in the Police Department of the Commonwealth of Puerto Rico. As specifically alleged in the complaint, there is a statute in the Commonwealth which gives a police officer the right to an administrative hearing before the imposition of disciplinary action. The petitioner was

1 The Commonwealth and the Police Department were dismissed and the petitioner did not appeal from that decision.

first suspended and then discharged without such a hearing. The suspension was a retaliatory one, for impermissible reasons which are set forth in detail in the complaint.

During his work, the petitioner discovered that two other police officers had obtained false evidence and offered it in evidence in a pending criminal prosecution. The petitioner reported this matter to a superior officer. As a result of this report, the respondent transferred the petitioner away from his normal duties and assigned him to the police academy with no investigative authority. An investigation by the Legal Division of the Police Department, however, then exonerated the petitioner of any wrongdoing and corroborated his accusations against the other officers.

Subsequently, the petitioner was subpoenaed by the defense lawyer in the criminal case in question and testified concerning the false evidence which had been offered by the two other police officers. Thereafter, and as a result of the petitioner's court testimony, the respondent obtained criminal charges against the petitioner for wiretapping, although he knew that there had already been a judicial determination that any alleged wiretapping had occured prior to the effective date of the stature making it illegal. The courts of Puerto Rico later found no probable cause for these criminal charges.

The suspension and discharge of the petitioner followed on the grounds that he had contested the honesty, integrity and competence of the other officers and for injurious, immoral or disorderly conduct which harmed the Police Department. The complaint specifically alleges that the discharge was based on the same facts upon which the petitioner had already been totally exonerated by the Legal Division.

The District Court granted the respondent's motion to dismiss for the reason that the petitioner had not specifically alleged bad faith on the part of the respondent. Petitioner appealed to the Court of Appeals for the First Circuit, which affirmed the decision of the District Court on August 7, 1979, holding that the plaintiff in an action under 42 U.S.C. §1983 must allege bad faith on the part of the defendant in order to state a valid cause of action.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS BELOW CREATES A CONFLICT IN THE DECISIONS OF THE CIRCUIT COURTS OF APPEALS.

The Court of Appeals below held that because public officials enjoy qualified immunity from suit under §1983, "it follows that a plaintiff must allege as well as prove that a public official acted in bad faith to state a valid cause of action." 602 F.2d,at 1020. Because the complaint failed to explicitly allege bad faith, the Court of Appeals affirmed its dismissal.[2]

The First Circuit alone requires plaintiffs in civil rights cases to plead malice or bad faith on the part of all official defendants in order to state a claim under 42 U.S.C. §1983. However, the decision below is not an isolated decision within the First Circuit, but reflects the developing policy of this Court of Appeals, as reflected in the series of decisions relied upon in the opinion of

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2 The rigidity of this requirement is especially apparent in the present case. As the Statement of the Case makes clear, plaintiff alleged that the Superintendent of Police discharged him for conduct which the Legal Division of the Department had already found was blameless on his part, and failed to hold a hearing prior to discharge despite a specific statutory provision requiring one. One might have thought that if any allegation of bad faith were required it was suggested by the bare facts themselves.

the court below. There are decisions, discussed immediately below, in every other circuit holding that the burden of establishing qualified immunity is on the defendants in §1983 actions. Only in the Fifth Circuit is there any support for the position that plaintiffs have the burden of negativing qualified immunity, and there only in some cases.

Perhaps the most direct conflict is with the Third Circuit Court of Appeals decision in Skehan v. Board of Trustees of Bloomsburg State College, 538 F.2d 53 (3d Cir., en banc, 1976), cert. den. 429 U.S. 979 (1976). A discharged state college teacher filed suit under §1983 for failure to receive a hearing prior to his termination. The court explicitly considered the question of which side has the burden of going forward with evidence and which side has the burden of proof with regard to the issue of qualified immunity. The court analyzed the issue in the light of this Court's decisions in Wood v. Strickland, 420 U.S. 308 (1975) and O'Connor v. Donaldson, 422 U.S. 563 (1975), and squarely held:

> We therefore hold that in §1983 actions the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact by a preponderance of the evidence that, under the standards of Wood v. Strickland,

> official immunity should attach.
> 538 F.2d at 61-62.

Other Third Circuit decisions are in accord. Safeguard Mutual Insurance Co. v. Miller, 472 F.2d 732 (3d Cir. 1973); Thompson v. Burke, 556 F.2d 231, 239 (3d Cir. 1977). These decisions are squarely in conflict with the First Circuit's rule that the plaintiff must plead and prove bad faith or the absence of qualified immunity.

Probably the leading case on the good faith defense in §1983 actions among lower federal court decisions is Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972). After deciding that federal police agents have no absolute immunity from suit for constitutional deprivations, the court held that such officers would have a defense of good faith:

> And so we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. Id., at 1348. (emphasis supplied)

That case thus clearly places the burden of raising the defense upon the official defendant. Laverne v. Corning, 522 F.2d 1144 (2d Cir. 1975) is in accord, and explicitly recognizes that the good faith defense and qualified

immunity amount to the same thing in §1983 cases.

The Fourth Circuit held that qualified immunity was a matter of defense and that the burden of proving it was on official defendants in McCray v. Burrell, 516 F.2d 357, 370 (4th Cir., en banc, 1975), cert. granted and later dismissed as improvidently granted on other grounds, 423 U.S. 923, 426 U.S. 471 (1976). In an addendum to the original opinion, the court specifically considered the impact of Wood v. Strickland, supra, on their opinion and held that Wood constituted additional authority for the conclusions of the court on the subject of qualified immunity.

In the Fifth Circuit, the Court of Appeals held in Bryan v. Jones, 530 F.2d 1210, 1213 (5th Cir., en banc, 1976), cert. den. 429 U.S. 865 (1976) that good faith is a defense to a §1983 false imprisonment action and that a plaintiff need not prove its absence to make out a prima facie case. Reimer v. Short, 578 F.2d 621 (5th Cir. 1978), cert. den. __U.S.__, 99 S.C. 1425 (1979) a case involving the claim of deprivation of property without due process of law, is in accord. There the Court of Appeals approved a jury instruction placing the burden of proving the good faith defense by a preponderance of the evidence on the defendants.

However, in the recent case of Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979), the court held that under some circumstances the plaintiff would have the burden of piercing qualified immunity by pleading and proving an abuse of authority where the defendant was the director of a statewide prison system. The precise impact of the case on pleading requirements is not clear. The court indicated that this burden on the part of plaintiff arose once the defendant had established his qualified immunity by virtue of asserting that his questioned decisions were made as director of the prison based on what he perceived to be a security need of the institution. Id., at 1183. Thus it would seem that plaintiff need not meet this burden in the initial complaint. In addition, although the court held that the burden shifts to the plaintiff in a case of a statewide prison director, it reaffirms that the burden is on the defendant where he is a police officer. Exactly where the line is drawn between these positions is not clear from this case.

To the extent that Cruz v. Beto has changed the law in this area in the Fifth Circuit, the conflict between lower federal courts even more urgently requires

definitive resolution by the Supreme Court.

In Glasson v. City of Louisville, 518 F.2d 899, 907-910 (6th Cir. 1975), cert. den. 423 U.S. 930 (1975), the Sixth Circuit reviewed the decisions in Wood v. Strickland, supra, and Scheuer v. Rhodes, 416 U.S. 232 (1974), and characterized qualified immunity as an "affirmative defense." In accord, Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972).

The Seventh Circuit explicitly adopted the Second Circuit's definition of the elements of the good faith defense from Bivens v. Six Unknown Named Agents, supra, in Tritsis v. Backer, 501 F.2d 1021 (7th Cir. 1974), citing the language requiring the officer to "allege and prove" the elements of the defense. 501 F.2d at 1022-1023. Other Seventh Circuit cases are in accord in treating qualified immunity as a defense. Brubaker v. King, 505 F.2d 534 (7th Cir. 1974); Boscarino v. Nelson, 518 F.2d 879 (7th Cir. 1975).

The Eighth Circuit has given a particularly clear statement of the matter in Landrum v. Moats, 576 F. 2d 1320 (8th Cir. 1978) cert. den. 439 U.S. 912

(1978):

> Because good faith is dependent on motivation and conduct of the defendant as established at trial, the validity of the defense is ordinarily a question for the jury. Moreover, like the other affirmative defenses originally predicated on the common law, the burden is on the defendant to prove each element of the defense to the jury's satisfaction. Id., at 1329.

In Gilker v. Baker, 576 F.2d 245 (9th Cir. 1978), the Ninth Circuit reversed the district court where it had granted a motion to dismiss at the close of the plaintiff's case. The court held that the plaintiff need only make out a prima facie case of a constitutional violation, and then the burden shifts to the defendant to establish a good faith defense. Donovan v. Reinbold, 433 F.2d 738, 739 (9th Cir. 1970), is in accord, holding that in a suit for an unconstitutional discharge from public employment good faith would be a defense.

In Martin v. Duffie, 463 F.2d 464 (10th Cir. 1972), the Tenth Circuit explicitly considered whether the plaintiff in a false arrest action must negative every possible justification for an arrest without a warrant. The court analyzes the issue in some detail, and squarely holds that the plaintiff need only establish a prima facie case of constitutional deprivation (in this case, a warrentless arrest) and then the burden shifts to the

the defendant to go forward with the evidence of justification. The court held that good faith must be put forward by the officer as a defense.

The District of Columbia Circuit has also explicitly placed the burden of proving qualified immunity on the defendants in §1983 actions. In Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), cert. den. 438 U.S. 916 (1978), reh. den. 439 U.S. 886 (1978), the court held:

> [T]here can be no doubt that state and federal police officers sued under Section 1983 and Bivens, respectively, have available to them a qualified immunity defense, a privilege based on good faith and reasonableness, but that the burden is on the defendant officers to prove it. Id., at 176. (emphasis in original)

In accord, Apton v. Wilson, 506 F.2d 83 (D.C.Cir. 1974); Zweibon v. Mitchell, 516 F.2d 594, 670-671 (1975), cert. den. 425 U.S. 944 (1976).

The cited cases establish that the nearly unanimous rule outside the First Circuit is that the burden of establishing a good faith defense and of asserting qualified immunity is on the defendants in civil rights cases. The decision below is thus in conflict with the other circuits and constitutes an aberration in an extrememly significant area of constitutional law. To the extent the decision below is supported by the Fifth Circuit

decision in Cruz v. Beto, supra, the need for Supreme Court resolution of the conflict is even greater. This Court should grant the petition for certiorari and reverse the decision below so that pleading requirements in civil rights cases will be uniform throughout the circuits.

II. THE DECISION OF THE COURT OF APPEALS BELOW IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT.

The question of whether a plaintiff in a civil rights action must plead bad faith or maliciousness on the part of the defendant is an important federal question which affects the drafting of literally thousands of complaints filed every year. The First Circuit has now held that every plaintiff in an action under 42 U.S.C. §1983 must allege bad faith or the complaint will be dismissed. This position is a complete departure from the prior decisions of the Supreme Court and certiorari should be granted so that the decision of the First Circuit can be reversed.[3]

The Supreme Court held in Monroe v. Pape, 365 U.S. 167, 187 (1961), that a civil rights plaintiff did not have to allege a wilful violation of constitutional rights or a specific intent to violate constitutional rights in order to state a cause of action.

3 Petitioner is of the opinion that the prior decisions of this Court clearly compel the conclusion that the burden of establishing qualified immunity is on a defendant in a §1983 action. In the event the Court disagrees and is of the opinion this issue has not been resolved, the need to grant certiorari and settle the issue is even more apparent.

This rule of pleading was reaffirmed in Pierson v. Ray, 386 U.S. 547 (1967), where the Court held that defendants in a §1983 action for false arrest would have available to them the defense of good faith and probable cause. The Court noted the difference between this matter of defense and the plaintiff's burdens in the drafting of the complaint, with specific reference to Monroe v. Pape:

> We also held that the complaint should not be dismissed for failure to state that the officers had 'a specific intent to deprive a person of a federal right,' but this holding, which related to the requirements of pleading, carried no implications as to which defenses would be available to police officers. 386 U.S. at 556.

The Court then held that the defense of good faith was available to the defendant officers, but specifically ruled that the count in question should not be dismissed and the issue of good faith should be submitted to the jury. Id., at 557.

The court below nonetheless held that the plaintiff must negative the existence of the defendant's qualified immunity in the complaint. In so doing, the court mistakenly granted the defendant a presumption,

in effect, that he had acted in good faith:

> Where, as here, a public official is being sued for action taken in his official capacity, it is assumed that he wears a cloak of qualified immunity and the complaint must allege and specify facts that show bad faith or state why in this particular case the cloak was shed. 456 F.2d, at 1020.

This proposition is in direct conflict with the decision of the Supreme Court in Scheuer v. Rhodes, 416 U.S. 232 (1974), in which the Court held there is no automatic assumption that defendant officials in §1983 actions have acted in good faith. There, the Court reversed the dismissal of a §1983 case on the pleadings, specifically holding that the good faith of the defendant officials could not be taken for granted:

> In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor . . . There was no evidence before the courts from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed. Id., at 250-251.

The decision of the Court of Appeals below is in flat contradiction to this language from Scheuer v. Rhodes.

The nature of the qualified immunity defense was

elaborated upon by the Court in Wood v. Strickland, 420 U.S. 308 (1975). That case held that, although malice may be a sufficient basis for liability in a case in which the constitutional law applicable to the conduct complained of was unclear, where the applicable constitutional principles were settled a plaintiff need not show malice on the part of an official defendant to prove a claim. Thus the Court reversed the directed verdicts that had been granted by the district court on the ground of immunity, despite the district court's conclusion that there was no evidence of malice.

The two most recent cases by the Court on the question of qualified immunity specifically denominate the matter as one of defense. In Procunier v. Navarette, 434 U.S. 555 (1978), the Court affirmed the granting of a summary judgment in a case where the defendants had raised the defense by motions supported with affidavits. Both the majority opinion of the Court, id., at 566 and the dissenting opinion of Justice Stevens, id., at 569, refer to qualified immunity as a defense, with Justice

Stevens labelling it as an "affirmative defense."[4]

Finally, in Butz v. Economou, 438 U.S. 478 (1978), the Court, in the context of a lengthy historical analysis of the immunity defense, specifically explains that qualified immunity has historically developed as a judicially created defense to the statutory cause of action under §1983:

> It has been observed more than once that the law of privilege as a defense to damage actions against officers of Government has 'in large part been of judicial making.'. . .Section 1 of the Civil Rights Act of 1871--the predecessor of §1983--said nothing about immunity for state officials. It mandated that any person who under color of state law subjected another to the deprivation of his constitutional rights would be liable to the injured party in an action at law. This Court nevertheless ascertained and announced what it deemed to be the appropriate type of immunity from §1983 liability in a variety of contexts. Id., at 502-503.

These cases make abundantly clear that qualified immunity is a matter of defense. If there is any obligation to mention it in the pleadings at all, it is on the defendant under Rule 8(c) of the Federal Rules of Civil Procedure. Thus this Court should grant ceritorari to reverse the decision of the First Circuit and remove this substantial and improper pleading hurdle from plaintiffs in that Circuit.

4 In Procunier the Court was considering only the negligence count of the complaint. The allegation of negligence, and hence a lack of malice, was insufficient to overcome the defense raised by the officials in this case because the constitutional right in issue was not clear at the time the alleged acts took place. Thus Procunier is an application of only one branch of Wood V. Strickland, supra. In the present case, the constitutional right was clear and thus proof of malice is unnecessary. Plaintiff alleged a specific statute which gave him the right to a pre-termination hearing. Thus, local law had clearly given him enough of an entitlement to his continued employment to implicate due process protections. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 564 (1972); Arnett v. Kennedy, 416 U.S. 134 (1974); Goss v. Lopez, 419 U.S. 565, 573 (1975). There is nothing in this record to suggest that Puerto Rican law in any way contravened the clear implication of the statute cited in plaintiff's complaint. Cf.Bishop v. Wood, 426 U.S. 341 (1976). In addition, although the petitioner did not specifically mention the First Amendment in his complaint, the facts pleaded establish that the discharge was in retaliation for his public testimony against other police officers and thus in violation of his First Amendment rights. This was well settled law by the time of the events complained of in this case. Pickering v. Board of Education, 391 U.S. 563 (1968).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX

THE DOCUMENTS LISTED AS APPENDICES TO THIS PETITION HAVE BEEN REPRINTED AND APPEAR IN THE APPENDIX VOLUME ITSELF.